Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of		
	)	
Review of the Commission's	)	MM Docket No. 94-150
Regulations Governing Attribution	)	
of Broadcast and Cable/MDS Interests	)	
	)	
In the Matter of		
	)	
Review of the Commission's Regulations	)	MM Docket No. 91-221
Governing Television Broadcasting	)	
	)	

To: The Commission

COMMENTS OF SJL COMMUNICATIONS, INC.

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SJL Communications, Inc. ("SJL"), by counsel, submits these comments in the Commission's Further Notice of Proposed Rulemaking, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Systems, MM Docket No. 94-150, FCC 96-436 (rel. Nov. 7, 1996) (the "Attribution Rulemaking") and the Second Further Notice of Proposed Rulemaking, Review of the Commission's Regulations Governing Television Broadcasting, MM Docket 91-221, FCC 96-438 (rel. Nov. 7, 1996) (the "Ownership Rulemaking") (the Attribution Rulemaking and the Ownership Rulemaking are referred to collectively as the "Proposed Rulemakings").

SUMMARY

As the licensee of a VHF, NBC - affiliated television station and the time broker of a UHF, Fox - affiliated television station in the Erie, Pennsylvania market (Nielsen DMA No. 143), SJL is in a unique position to provide a real-world test of the principles advanced by the Commission in the Proposed Rulemakings. The realities of the Erie market demonstrate that significant public interest benefits can and do flow from combinations of certain television operations, including those that result from time brokerage agreements (generally referred to as "LMA's" or "TBA's"), without diminishing competition or diversity. Indeed, SJL's actual experience challenges many of the assumptions which the Commission has made and is making about multiple ownership in a local context.

The Erie market demonstrates that, in today's deeply-cabled landscape, the historic distinctions between VHF and UHF stations sometimes no longer exist and certainly should not be presumed. Competition between VHF and UHF stations in many markets is vigorous, and there are sometimes no meaningful differences in audience,

revenues or profitability among VHF and UHF network affiliates. Combinations of operations, such as those resulting from time brokerage arrangements between two stations in a market (whether VHF or UHF), at least in markets like Erie, prove to be the basis for substantial improvements in public service that may not otherwise be economically possible for independent stations. Based on its experience in Erie, SJL submits that:

(i) The Commission should relax its local television ownership restrictions and permit ownership or control of two television stations in the same market. Permitting combinations through common ownership or through LMA's is sensible from a market perspective, enhances the quality and depth of program service, and does not unreasonably concentrate ownership. With respect to LMA's, this result can be accomplished by exempting LMA's from the Commission's attribution rules or, more logically, by deeming LMA's to be attributable and explicitly authorizing such interests as duopolies.

(ii) Any limitation on this duopoly rule should be based on market share of audience or revenue tests, and not on other categorical or theoretical distinctions such as those based on generalized, often antiquated perceptions of differences between VHF and UHF facilities. The Commission should not arbitrarily restrict the combination of VHF and UHF stations by common ownership or via LMA arrangements.

(iii) If the Commission determines to limit the "grandfathering" of existing LMA's to their current term, it will act in a manner contrary to the expressed intent of Congress and would result in (i) severe consequences for current LMA operators, (ii) a patent reduction in public service and (iii) arbitrary, unreasonable distinctions among markets which would disserve the public.

COMMENTS

I. BASED ON THE ERIE EXPERIENCE, A FOURTH, INDEPENDENTLY-OWNED TELEVISION STATION MAY NOT BE VIABLE

SJL is the licensee of television station WICU(TV), Erie, Pennsylvania. For over thirty years, three television stations have vigorously competed for audience and revenue in Erie: WICU (NBC, Channel 12), WJET (ABC, Channel 24) and WSEE (CBS, Channel 35). The Erie market is a small one -- Nielsen DMA market 143, with approximately 150,000 DMA TV households. See 1 Broadcasting & Cable Yearbook (1996 ed.) (the "B&C Yearbook"), at C-176. SJL also provides sales and programming services to television station WFXP(TV), Erie, Pennsylvania, pursuant to a TBA with the licensee of that station.[1] WFXP began operations in 1986 as a low power television station. The station has recently been converted to a full-service station by a prior licensee. WFXP is affiliated with the Fox network.[2]

Operating a fourth station in such a small market has historically proven difficult. WFXP was only marginally profitable for 1995, the year prior to the commencement of the Erie TBA, with an approximate net income after tax of only

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[1] SJL's acquisition of WICU(TV) and its TBA of WFXP (referred to herein as the "Erie TBA") were both vigorously contested by the licensees of the other local network affiliates in Erie. The Commission rejected those challenges and granted SJL's applications. See Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, to Melissa M. McGonigal, Esq., Richard J. Bodorff, Esq., Dennis F. Begley, and Meredith S. Senter, Jr., dated July 12, 1996, FCC File Nos. BTCCT-960205IE and BALCT-960311IA. The licensee of the local ABC affiliate has filed an Application for Review of that decision, which is pending.

[2] Factual assertions contained in these Comments without citation are supported by the Declaration of George D. Lilly, attached as Exhibit 1.

$90,000. See Exhibit 2. Furthermore, WFXP only accounted for 6.8% of national spot revenue in the Erie market in 1995. See Exhibit 3. Comparatively, the other three stations in Erie each accounted for at least 29% of these vital revenues. Id. WFXP generated less than a third of the net revenues of WICU in 1995, and an even smaller percentage of the estimated net revenues of WJET and WSEE.[3]

Similar competitive difficulties are evident from an examination of the historical audience viewership of WFXP. The three older stations in Erie have vigorously competed over the least several years. In fact, during those time periods, each of those stations has obtained approximately equal audience shares of about 20%. However, WFXP has always lagged substantially behind the group. During the period from November 1993 through November 1996, the maximum audience share that WFXP has taken has been a 7% share, and it has generally ranged between 3-7% during this period. See Exhibit 4.

The difficulty of operating a fourth station in Erie is plainly reflected by the conditions under which employees of WFXP attempted to compete. The main computer system used by WFXP employees was an antiquated vax system, which was cumbersome and not tailored in any way to the needs of a television station staff. Several desktop computer terminals were also available; however, the WFXP sales staff did not have access to any meaningful computer tools or information sources that would allow an effective, targeted sales effort. Whereas other television stations utilize current software to assist in sales efforts, employees of WFXP used an older-vintage version of Nielsen software with

[3] Net revenues for WICU for 1995 were approximately $4,500,000. See Exhibit 2. Revenues for WJET for 1995 are estimated at $6 million, and revenues for WSEE for 1995 are estimated at $5.3 million. See BIA's Investing in Television-Market Report '96, Erie Market Overview ("BIA").

no upgrades. This lack of meaningful, current software relegated these terminals to the status of advanced typewriters. The station lacked resources to maintain formal training programs.

The equipment used by production and master control personnel in producing and playing back the programming of WFXP was extremely substandard and contributed to a rough, unprofessional programming product on the station. Equipment used to generate local commercials and programs was also inferior to that used by other stations in the market. Much of the equipment used generally in the operation of the station was desperately in need of repair or maintenance. Although WFXP had a dedicated studio facility, it was stocked with very low-grade equipment that was near the end of its useful life, and as a result, was only used to produce programming approximately once every two weeks. Picture quality was chronically poor.

The actual programming broadcast on WFXP prior to the Erie TBA most clearly demonstrates the station's historic inferiority. Most significantly, no local news programming was originated by WFXP whatsoever [4] This void was accompanied by a complete dearth of local weather programming, local sports programming or other local interest programs. No break-ins or bulletins for local weather emergencies were broadcast on WFXP. Even when attempting non-broadcast community involvement, the Station was frustrated by its lack of resources: the station formed the "Fox Kid's Club," a local children's card-carrying membership club that allowed participation in on-air contests that were created or participated in by WFXP. The idea generated substantial local interest (at

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[4] Recognizing the need for a local news program, for a short time WFXP replayed from 7:00 - 7:30 on weeknights the local evening news previously broadcast from 6:00 - 6:30 p.m. on WSEE (the local CBS affiliate). This project lasted approximately six months but was ultimately scrapped.

its height, the Fox Kid's Club had 10,000 members); however, the project foundered because the station could not marshal adequate staff time to produce it.

This evidence demonstrates the substantial difficulties that a television operator faces in operating a fourth station independently in a small market such as Erie. Meaningful local programming and community services for these stations is often minimal or nonexistent. For such marginal operations, the ability to have programming and sales services provided via common operation with another station in the market or via an LMA arrangement can often be the difference between continued viability and financial ruin.

II. ALLOWING SJL TO OPERATE TWO TELEVISION STATIONS IN ERIE HAS MADE SENSE FROM ECONOMIC AND PUBLIC INTEREST PERSPECTIVES

Since the commencement of the Erie TBA operations in August 1996, SJL has embarked on an aggressive campaign to improve all facets of WFXP's operations. Critical to this strategy is the ability to husband the resources of WICU, generating operating efficiencies which justify capital expenditures and create the opportunity for WFXP to be a viable station in the Erie market.

First, SJL has undertaken the expensive process of upgrading the production and playback equipment at WFXP. SJL eliminated the old, 1975-vintage 3/4" tape system and acquired ten Sony Betacam videotape machines utilizing a state-of-the-art, 1/2" tape system, with an automated playback system that allows for much more seamless breaks and lead-ins. The new equipment allows for an improved picture and a higher quality of programming that can be broadcast on WFXP. SJL also purchased ten broadcast-quality, DX-brand satellite receivers to replace the variety of consumer-quality satellite equipment previously used at WFXP. Needed repairs to much of the equipment that was not replaced were also undertaken by SJL. In total, this effort has cost in excess of $750,000 thus far. These improvements, repairs and maintenance are considered crucial, especially in light of the anticipated conversion to advanced television service.[5] Through access to its equipment at WICU and additional capital upgrades, SJL has also significantly improved the equipment available for use by WFXP for the production of local programming and commercials. These improvements allow for faster production time and better overall quality of local program product.

SJL has been able to improve working conditions for employees of WFXP. Sales personnel now have access to a state-of-the-art Columbine traffic system that has significantly greater sales effort applications. Additionally, formal computer training programs are now available for personnel of WFXP.

Second, and perhaps most significantly, the ability to combine certain operations and take advantage of operating efficiencies will allow SJL to deliver needed alternative local programming on WFXP. In particular, SJL intends to premier "Fox News Erie," a Monday - Friday, 10:00 p.m. local news program on WFXP, where none existed before. This news program would be the only 10:00 p.m. news program created in Erie, and would be the earliest late-night news program available, as the other local stations produce only 11:00 p.m. news programs. This program will cover a wide range of local and metropolitan issues. For the first time, local weather programming will be broadcast

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5 See Sixth Further Notice of Proposed Rulemaking, Advanced Television Systems and Their Impact Upon the Existing Broadcasting Service, MM Docket No. 87-268, FCC 96-317 (rel. Aug. 14, 1996); Fifth Further Notice of Proposed Rulemaking, FCC 96-207 (rel. May 20, 1996); Fourth Further Notice of Proposed Rulemaking and Third Further Notice of Inquiry, 10 FCC Rcd. 10541 (1995).

on WFXP via this news program. SJL will utilize its meteorological staff from WICU to assist in the efforts of WFXP. Break-ins and bulletins with emergency weather information are also planned for the first time. WFXP will now have access to the Associated Press news wire, covering national news issues, and the Fox news service, covering national and regional news issues. These services were not previously utilized by WFXP; each will significantly enhance the type of news product that is broadcast on the station. Although the primary effort behind this local news program will be exclusive to WFXP -- including the services of a managing editor, a producer, and certain talent -- much of the resources to debut this program can and must come from and be shared with WICU.

Other significant local programming improvements are planned for WFXP as well. SJL intends to debut a half-hour local sports program on Saturdays that focuses on Erie high school and local college sporting events and issues. SJL plans to upgrade its locally-formed, locally-oriented children's membership club, the "Fox Kid's Club," by increasing the resources that are focused on this effort. SJL also intends to improve the quality and amount of public service, in the form of programming that responds to community needs and issues, as well as relevant PSAs and public affairs programming on WFXP. As a result of operating efficiencies, both WFXP and WICU will be able to dedicate more resources to handling these crucial public affairs issues. Prior to the Erie TBA, WFXP alone had few resources to either explore community needs or seek solutions. The newly-created WFXP news program will help the station address local issues for the first time. A meaningful public service campaign will be developed to seek the resolution of problems and issues. These improvements will deliver tangible results to viewers and local organizations.

Third, SJL intends to combine certain other operating costs and resources of WICU and WFXP in a manner that will allow positive efficiencies of scale to benefit WFXP. For example, SJL plans to consolidate the WFXP and WICU studios into one location. Such a consolidation would give WFXP the opportunity to utilize much of WICU's equipment and internally produce additional meaningful local programming. Upon this consolidation, which is expected to occur in April 1997, increased numbers of employees will be available to assist in WFXP programming. SJL also intends to take advantage of other operating efficiencies. For example, it has or plans to have only one programming director, one business manager, and one creative services department for promotions for both WFXP and WICU. Additionally, it will be able to consolidate certain equipment systems, such as computers and telephone. These operating consolidations will allow SJL to invest significantly more in the programming content of WFXP.

Based on this experience, SJL believes that allowing common ownership or operation of two local television stations, when at least one of the stations is not financially stable, makes sense from economic and public interest standpoints. By sharing certain costs of operating a marginal station with another station, an operator may be able to provide improved local programming, better news operations, a better technical product, more community service and better programming choices for viewers in that market. Television operators will be able to increase the number of viable local television stations and, concomitantly, increase the diversity of programming and choices available.

III. THE COMMISSION SHOULD EXPRESSLY PERMIT OWNERSHIP OR OPERATION OF TWO TELEVISION STATIONS IN THE SAME MARKET

The Commission's Proposed Rulemakings carry forward the notion that local ownership of television stations should be limited to one local attributable station. The Commission has stated that it is most concerned with the impact that local television duopolies have on diversity.[6] However, this concern, which has its roots in an era when there was a limited number of outlets for expression of viewpoints, is far more attenuated. To the knowledge of SJL, no empirical data exists that insufficient diversity of viewpoints is a problem in today's marketplace. Moreover, SJL's experience is that, even in small markets such as Erie, diversity is not a real problem because of the broad flow of information. Erie cable systems bring in numerous news and information stations, including CNN, CNBC, Headline News, C-SPAN, C-SPAN 2 and The Weather Channel.[7] Two daily Erie Newspapers -- the Erie Morning News and the Erie Daily Times -- provide broad diversity of viewpoints.[8] Numerous periodical and regional newspapers and distributions also are published. Sixteen radio stations blanket the Erie market with differing viewpoints.[9] DBS systems now have the capability to bring in a plethora of additional viewpoints to Erie. There is no shortage of voices and viewpoints being expressed in small markets (as well as larger markets) such as Erie

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6 See Ownership Rulemaking at 3.

7 See Television & Cable Factbook, Cable Vol. 64 (1996 ed.), at D-1465.

8 See Duncan's Radio Market Guide (1995 ed.), Erie Market Overview.

9 See BIA's Investing in Radio - Market Report '96 (3d ed.), Erie, PA Market Overview.

SJL proposes that the Commission move away from its historical position and embrace the concept of television duopolies. SJL strongly supports the position espoused by the National Association of Broadcasters in this respect.[10] SJL's experience in Erie demonstrates that significant public benefits can and do result from such operations. SJL believes that such duopolies should be limited only by traditional antitrust principals, rather than artificial restrictions such as VHF / UHF distinctions. The Commission has taken this approach towards local ownership of radio broadcast stations and should do so with respect to television.

SJL does not propose an unfettered television duopoly regime. However, categorical or theoretical distinctions are no longer valid bases for determining whether one duopoly is in the public interest but another is not. Rather, the appropriate method of limiting television duopolies is through traditional antitrust principles. As demonstrated in its treatment of numerous proposed radio broadcasting transactions, the Antitrust Division of the Department of Justice has been vigilant in markets (large and small) in which antitrust issues may be implicated by common broadcast ownership. The Department of Justice has been aggressive in executing its Hart-Scott-Rodino Act antitrust responsibilities, and in smaller markets, has initiated civil investigative demands where competitive issues may be implicated.[11] The Department of Justice is actively establishing benchmarks of permissible concentration of radio market revenues and audience shares; the Commission has used similar audience share threshold levels in the past,[12] and could do so again for

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10 See NAB Backs Call for More, Broadcasting & Cable (Feb. 3, 1997), at 4-5.

11 See, e.g., Justice Caps Radio Ownership, Broadcasting & Cable (Aug. 12, 1996), at 9.

12 See 47 C.F.R. § 73.3555(a)(1)(ii) (1995) ("In radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that

television. In short, it may make sense to limit a television operator to 40% (or some other threshold) of market revenues or audience share, but, absent such concentration, there is no compelling reason to limit duopolies in television.

Although diversity in programming - which critics of duopolies argue could be threatened - is a laudatory and complementary goal within the Commission's province, the practical reality is that all markets are now inundated with multiple television viewpoints through cable, DBS programming, wireless cable, and increased numbers of over-the-air television stations. With the advent of ATV not far in the future, the prospect of multiple programs from individual television licensees will also vastly increase the choices available to viewers.

Critics of duopolies believe that permitting local duopolies may concentrate too many media outlets under a single "voice." However, there are numerous instances - including those demonstrated by WFXP - where a fringe station offers no meaningful local programming of any sort, and struggles merely to survive. In these cases, the fringe station is not in reality a meaningful voice in its market. Duopolies and LMA's often provide the only viable opportunity for many fringe stations to "speak" at all.

Accordingly, SJL believes that duopolies should be expressly authorized by the Commission. Duopolies should not be prohibited on the basis of categorical or theoretical "concentration" arguments that are not grounded in reality. Rather, market-

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evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered prima facie inconsistent with the public interest."). The Telecommunications Act liberalized local radio ownership limits and thereby mooted the 25% audience test, but there has been no similar supervening act in television.

based issues - such as combined revenue share or audience share - are the only appropriate factors to determine how, if at all, a television duopoly should be limited.

IV. HISTORICAL DISTINCTIONS BETWEEN VHF AND UHF TELEVISION STATIONS DO NOT JUSTIFY DISPARATE TREATMENT FOR CURRENT MULTIPLE OWNERSHIP PURPOSES

Opponents of dual ownership or operation of local television stations frequently argue that such combinations should be categorically prohibited. These critics strongly believe that VHF-VHF station combinations should be absolutely barred. Opposition to VHF-UHF combinations is also being advanced. Such distinctions are made because VHF television stations historically enjoyed certain advantages over UHF stations. Allowing television duopolies (at least with respect to VHF-VHF or VHF-UHF combinations), such critics argue, would allow the proverbial rich -- i.e., VHF stations -- to get richer as they combine operations with other VHF or UHF stations and dominate local competition.

SJL's experience in Erie has indicated that, in the current competitive landscape, categorical distinctions based on the class of service facility may no longer make any sense. Although VHF stations historically enjoyed dominance in many markets due to technological advantages, superior receivers, and old viewing patterns, that is no longer always true. UHF has achieved parity with many VHF stations due to changes in transmission technology, improved receivers and the advent of significant cable carriage.[13]

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[13] Cable penetration is not atypical in Erie. Approximately 66% of Erie households are equipped with cable systems. See Duncan's Radio Market Guide (1996 ed.). Similarly, approximately two-thirds of U.S. television households subscribe to cable or other multichannel video programming services. See Ownership Rulemaking at 8, fn. 20. Thus, with a typical cable penetration rate, UHF stations in Erie have been able to remain fully competitive.

Furthermore, in small geographic areas such as the Erie market, differences between VHF and UHF technology are not as important when it comes to signal coverage.

SJL's experience with the Erie market confirms that the VHF-UHF dichotomy (to the extent it may still have vitality in other markets) has no relevance there. As demonstrated earlier, competition among the three established stations in Erie has been, and remains today, extremely vigorous. Ratings book after ratings book, the three older stations have each obtained approximately a 20% audience share. In six of the last ten ratings periods, one or both of WJET or WSEE has either outperformed or tied WICU as a matter of audience shares. See Exhibit 4. WJET (a UHF station) was the number one station in both audience delivery and national spot revenue for the Erie market in 1995, and was the top station for national spot revenue in 1996. As indicated in Section I above, each of the established UHF stations has also generated higher revenues than WICU. In the case of WJET, the increase is a formidable 133% over that of WICU for 1995. WICU -- the supposed VHF "juggernaut" in Erie -- has not done materially better in any respect than its UHF competitors and enjoys no apparent advantages over WJET and WSEE solely as a result of its VHF status.[14]

This evidence clearly indicates that categorical distinctions based on whether a facility operates on VHF or UHF spectrum are no longer valid bases to decide local ownership policies. As demonstrated in Erie, combinations of certain VHF - UHF stations

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14 The lack of disparity between VHF and UHF stations in Erie is also evident from recent sale prices for two stations in the market. Both WSEE (UHF) and WICU (VHF) were sold in 1996. The sale price for WSEE was $12 million, while that for WICU was $11 million. See Broadcasting & Cable (Feb. 3, 1997), at 27.

may provide significant public benefits, and would create market dynamics no different than UHF-UHF combinations.

V. LMA'S SHOULD BE TREATED AS ATTRIBUTABLE, PERMITTED INTERESTS FOR MULTIPLE OWNERSHIP RULE PURPOSES

The issue of whether to deem LMA's to be attributable interests for multiple ownership purposes is tortuous and, ultimately, specious. The depth and extent of time broker involvement in the business of the brokered station -- programming and advertising sales -- mocks the notion that such an interest is not "attributable." Rather than strain to find LMA's to be "nonattributable," the Commission should adopt the more sensible view -- as it has in radio -- that these interests are functionally equivalent to ownership for attribution purposes, and then embrace the concept of duopoly.

Television LMA arrangements derived from the radio industry, where they were created to solve industry-wide financial distress. To accommodate its former prohibition against radio duopolies, the Commission required licensees to retain ultimate control of their stations, while permitting them to cede all programming and sales rights to the time broker. This has led to maintaining two general managers, two technical/engineering supervisors, and some separation and duplication of facilities. From a business standpoint, maximum operating efficiencies and economies of scale can only be realized if operations of two stations are permitted to fully integrate. There is no compelling public interest reason to prohibit this integration. The proof of this business logic is in the results : when the Commission expressly permitted radio duopolies, long-term radio LMA's virtually disappeared.[15] The device is now generally used in the radio

15 Since the passage of the Telecommunications Act of 1996 (the "Telecommunications Act"), radio owners are now permitted under the Commission's rules to own or operate up to eight radio

industry only to attain certain business benefits of a transaction contemplated by an assignment or transfer of station authorizations prior to Commission approval.[16] In the television industry, permitting duopolies would likely lead to the same result. For the present, SJL urges the Commission to permit local television duopolies generally, whether through direct ownership, or as a second, significant (and "attributable") LMA interest.

VI. THE PROPOSED RULEMAKINGS VIOLATE THE EXPRESSED INTENT OF CONGRESS

If the Commission concludes that LMA's disserve the public interest, it would be acting in direct contravention to the express will of Congress. Congress has repeatedly recognized that LMA's make valuable public interest contributions. Although the Telecommunications Act provided for a major overhaul of the Commission's ownership rules, Section 202(g) provides that "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the rules and regulations of the Commission." This strong policy in favor of LMA's is evidenced in the legislative history underlying the Act. The conference report to the Act indicates that Congress was concerned about "depriv[ing] the public of the benefits of existing LMAs." Report on Telecommunications Act of 1996, Conference

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stations in a single market, depending on the size of the market. See 47 C.F.R. § 73.3555. SJL acknowledges that some LMA arrangements such as "sales LMA's" may present closer questions of attribution and local concentration. For purposes of these Comments, SJL only refers to LMA's that allow a time broker to provide both sales and programming services for essentially all of the air time on a station.

16 The Antitrust Division of the Department of Justice has recently indicated that the commencement of LMA's entered as part of a sale of a station prior to expiration or early termination of any waiting period required by the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (the "Hart-Scott-Rodino Act"), may be illegal. See DOJ Crackdown: JSA's Next Target, 13 Radio Business Report (Oct. 28, 1996), at 4 (citing speech of Deputy Assistant Attorney General Lawrence Fullerton given Oct. 21, 1996). Parties to these types of radio LMA's now typically condition the commencement of any LMA on receipt of any necessary action by the Department of Justice or the Federal Trade Commission.

Report, No. 458, 104th Cong., 2d Sess., at 163 (Jan. 31, 1996). Several lawmakers stated their strong support for continued vitality of LMA's as a result of the extremely valuable contributions that these arrangements provide.[17]

Congress recognizes that valuable efficiencies and economies of scale -- efficiencies that can often mean the difference between viability and failure for financially stressed independent stations -- are created when an owner of one station in a market is able to share certain operating expenses with a second station in the market. In passing the Telecommunications Act, numerous legislators stressed the benefits that LMA arrangements can create. As Senator Daniel Inouye wisely noted:

> [t]his new competition, such as from clustered cable systems, offering advertisers the same buy as local broadcasters (but on multiple channels), threatens the very viability of free, over-the-air programming. Broadcasters have searched for creative solutions to these marketplace changes, and one proven solution has been Local Marketing Agreements. These LMAs are innovative joint ventures which enable separately owned stations in the same market to find economies of scale through combined operations.

142 Cong. Rec. S706 (daily ed. Feb. 1, 1996) (statement of Sen. Inouye). See also, e.g., id. at H1164 (statement of Rep. Fields) ("These joint ventures enable broadcasters to take advantage of the economies of scale and synergies that provide more outlets for free and innovative local and other programming. LMAs have enabled new stations to get on the air and struggling stations to stay on the air."); id. at S705 (statement of Sen. Ford):

[17] See, e.g., 142 Cong. Rec. H1162 (daily ed. Feb. 1, 1996) (statement of Rep. Oxley) ("It is important that broadcasters are granted the flexibility that these innovative agreements make possible. They help ensure the continuation of free, over-the-air local broadcasting."); id. at H1165 (statement of Rep. Fields) ("LMAs can increase the amount of local news programming").

> These innovative joint ventures allow separately owned stations to function cooperatively, achieving economies of scale through combined sales and advertising efforts, and shared technical facilities. . . . some have increased coverage of local news; others have increased coverage of local sports, particularly college sports; and many LMA's have provided outlets for innovative local programming and children's programming.

Deeming LMA arrangements to be attributable, without a concurrent authorization of television duopolies, would have the direct effect of depriving the public of the significant benefits that LMA's can provide. As such, the Commission would be violating Congress' intent.

VII. THE COMMISSION'S PROPOSAL LIMITING "GRANDFATHERING" OF LMA ARRANGEMENTS WOULD BE COUNTERPRODUCTIVE

The Commission has suggested in the Proposed Rulemakings that it may retain its prohibition against local ownership or operation of more than one television station but consider "grandfathering" existing LMA arrangements in the event that it deems LMA's to be attributable ownership interests.[18] The Commission suggests that it may consider grandfathering existing LMA's for the current term of the LMA only, requiring a time broker to seek a waiver of the duopoly rules at the end of that term (if necessary).[19]

Any attempt to limit grandfathering of LMA's in the manner that the Commission currently suggests would be arbitrary and capricious and counterproductive to the public interest. There are a broad variety of circumstances and relationships existing now because the issue of LMA's in television has been left in a state of regulatory limbo for

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18 See Ownership Rulemaking at 88.

19 Id.

years. The result has been a panoply of LMA's in different markets, each with its own unique circumstances, terms and conditions.[20] A grandfathering only for the current term would protect those relationships for one year or less in some markets, and ten years or more in others. This inconsistency would enshrine a haphazard pattern of local television operations that no one intended and, from a federal regulatory standpoint, seems to make no sense.

In addition, if time brokers only have the certainty of a single LMA term, they will be unwilling to invest the resources necessary to allow marginally profitable stations to provide significant community services. For instance, if SJL has no certainty that it will be able to continue to provide sales and programming services to WFXP after the initial term of the Erie TBA (which expires in 2002), it will most likely not make additional technical and programming investments -- including those that will become necessary with the transition to ATV operations -- that will be necessary for the long-term success of WFXP. Indeed, this policy would badly constrain access to the capital markets, since lenders and investors would be unwilling to fund into a project whose future and viability were so uncertain.

The logical alternative, of course, is simply to grandfather all existing LMA's on a permanent basis, much as the Commission did in adopting other multiple ownership rules.[21] This would be preferable, because it would limit the adverse

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[20] In the top 100 markets alone, at least forty LMA's exist. See Consolidation Yea or Nay, Broadcasting & Cable (Jan. 27, 1996), at 5. A number of smaller markets - at least ten - also have LMA arrangements. Id.

[21] See, e.g., Second Report and Order, Docket No. 18110, 50 F.C.C. 2d 1046 (1975); recon. denied, 53 F.C.C. 2d 589 (1975).

consequences of forced divestiture. However, a licensee or time broker precluded from selling two stations which were developed in combination as a unitary business under an LMA is likely still to face the negative investment incentives and restrictions to capital because it would have no viable opportunity to exit from that investment, except by dismantling the developed enterprise. In short, only a permanent grandfathering of existing LMA's, with the right to convey both an owned local television station and an LMA'd station to a single buyer, serves the public interest Ultimately, this rulemaking presents a more propitious opportunity for the Commission simply to approve duopolies themselves, recognize the overriding public interest benefits they provide, and authorize them on a permanent basis.

CONCLUSION

Because of the changed television landscape, the Commission should move away from its prior local ownership regime and embrace local television duopolies. Based on SJL's experience in Erie, combinations of local stations through LMA arrangements can allow for substantial improvements in public service. These improvements create a more favorable environment for both (a) a better overall broadcasting product and (b) an increased number of competitive, viable television outlets in small markets. Accordingly, SJL urges that the Commission modify its existing ownership rules and authorize television duopolies.[22] In any event, should the Commission opt to restrict some duopolies, it should only do so on traditional antitrust grounds. Any differences based simply on broadcast spectrum are not justified in fact, and VHF and UHF stations should not be treated differently. Finally, if the Commission does limit LMA's, it should permanently grandfather those that currently exist, with no restrictions on transferability.

22 SJL submits that, concurrently, the Commission initiate a further rulemaking to determine how, if at all, such duopolies should be limited.

Date: February 7, 1997

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